



IN THE LABOUR APPEAL COURT OF SOUTH AFRICA, JOHANNESBURG

Reportable

Case no: JA 64/2016

In the matter between:

BILLION GROUP (PTY) LTD

Appellant

and

MOTHUSI MOSHESHE

First Respondent

COMMISSION FOR CONCILIATION MEDIATION

AND ARBITRATION

Second Respondent

MOTLATSI PHALA N.O.

Third Respondent

Heard: 21 September 2017

Delivered: 21 November 2017

Summary: Employee employed on a six-month fixed term contract. Dismissal for poor work performance found by CCMA to be procedurally and substantively unfair, with employee awarded four months' compensation. On review the Labour Court found the dismissal substantively fair but procedurally unfair and ordered the employer to pay the employee two and a half months' compensation, being the remainder of the fixed term contract, with interest from the date on which judgment was reserved. Leave to appeal granted against the quantum of compensation and interest orders only. On appeal held that Labour Court did not err, save for that interest should properly have been ordered from the earlier date on which the arbitration award issued. Compensation order upheld. Appeal dismissed with costs.

Coram: Waglay JP, Sutherland JA and Savage AJA

JUDGMENT

SAVAGE AJA

Introduction

- [1] This is an appeal against only the quantum and costs orders of a judgment of the Labour Court (Olivier AJ), with the leave of that Court, in terms of which the appellant, the Billion Group (Pty) Ltd, was ordered to pay to the first respondent, Mr Mothusi Mosheshe (the employee), two and a half months' compensation for procedural unfairness in his dismissal and interest from the date on which judgment was reserved by the Labour Court. The employee seeks to cross-appeal against the finding that his dismissal was substantively fair.
- [2] On 26 July 2010, the appellant, which conducts business as the owner and manager of a number of retail properties, employed the employee as its Group Financial Manager on a six-month fixed term contract to expire on 31 January 2011. On 4 November 2010, the appellant notified the employee to attend a poor work performance investigation on 9 November 2010. At the hearing, although the appellant was represented by its attorney, Dr G Ebersohn, the employee was refused legal representation and informed that he could be assisted by his sister. Since his sister was unavailable, the hearing proceeded with the employee unrepresented. After the chairperson expressed concern that since the employee faced a complaint of gross negligence, it was unclear whether the hearing concerned allegations of misconduct or poor work performance, the matter was postponed for the appellant to clarify the issue and allow the employee sufficient time to prepare for the matter.
- [3] Shortly thereafter, on 12 November 2010, the employee received a new notice to attend a "*Final Poor Work Performance Investigation*" on 14

November 2010 at which he was notified that issues related to his alleged failure to complete and submit VAT assessment returns timeously; his incorrect completion of a VAT assessment; his failure to complete certain PAYE, SDL and UIF returns, prepare proper management accounts for the Group and load payments onto the computer system; and his negligence in failing to correctly adjust employees' salaries for one month were to be considered. The notice concluded by stating that, as a result of the allegations raised, the employee was responsible for *"...irreparably damaging and destroying the trust relationship between you and your employer."*

- [4] The second hearing, at the instance of the appellant, proceeded before a new chairperson. The appellant was again represented by Dr Ebersohn and although the employee sought to be represented by his attorney, Mr Zwane, who was present at the hearing, inexplicably the chairperson refused that application. As Mr Zwane left the hearing, Dr Ebersohn was recorded on record to remark sarcastically *"tata bye bye"* and the hearing proceeded with the employee unrepresented. The employee was found to have committed the misconduct alleged and he was dismissed from his employment with the appellant.
- [5] Aggrieved with his dismissal, the employee referred a dispute to the Commission for Conciliation Mediation and Arbitration (CCMA). The commissioner found the dismissal both procedurally and substantively unfair. The hearing was found to have been fatally flawed as it concerned complaints of misconduct and not poor work performance, the appellant's legal representative had inappropriately directed proceedings, with the employee unrepresented, and the outcome was found to have been a foregone conclusion. Since the employee did not seek reinstatement or re-employment but only the two and a half months remaining on his fixed term contract, the commissioner awarded compensation for both procedural and substantive unfairness in the dismissal. In doing so, the employee was awarded four months' compensation in the amount of R216 666,68.

- [6] The appellant sought the review of the arbitration award by the Labour Court on the basis that it was unreasonable insofar as the commissioner had failed to find on the evidence that the dismissal was substantively and procedurally fair and had awarded the employee more compensation than was permitted in law or had been sought by the employee.
- [7] On review, the Labour Court found the commissioner's finding of substantive unfairness to have been unreasonable and set it aside on the basis that it had been arrived at without regard to the evidence. However, the Court found that there was no basis on which to interfere with the finding of procedural unfairness. This was so in that the refusal of legal representation had placed the employee at a "*distinct disadvantage*" at the hearing, which was "*prejudicial and unfair*" in that it set the employee up against the appellant's experienced attorney. The Court was also critical of the conduct of the chairperson of the hearing who had failed to censure Dr Ebersohn for his "*cynical, if not sarcastic manner during the hearing*".
- [8] Turning to the issue of relief, since the employee had only sought to be paid out for the remainder of his fixed term contract, the Court found, with reference to *Tshongweni v Ekurhuleni Metropolitan Municipality*,¹ that the commissioner was not permitted to award more compensation than what the employee would have earned. The dismissal was consequently found to be substantively fair but procedurally unfair, with the appellant ordered to pay the respondent two and a half months' compensation, calculated at the rate of R54 166.67 per month, plus interest at the prescribed rate from the date on which judgment was reserved. There was no order as to costs.

Submissions on appeal

- [9] The appellant was granted leave to appeal against the judgment of the Labour Court limited only to the decision to the quantum of compensation awarded for procedural unfairness and the order that interest accrue on such amount from the date on which judgment was reserved. Leave to appeal against the finding of procedural unfairness, this Court was informed from the bar, was refused

¹ (2012) ILJ 2847 (LAC) at para 40.

by the Constitutional Court. The employee seeks to cross-appeal against the finding that his dismissal was substantively fair and against the reduction in the amount of compensation awarded to him.

[10] It was submitted for the appellant that the Labour Court erred in the exercise of its discretion to grant compensation to the employee when regard should have been had to the fact that he was employed on a fixed term contract, that he was found guilty of five complaints and suffered no real prejudice as a result of his lack of representation. Furthermore, it was contended that the Court had erred in ordering that interest be paid from a date prior to the date of the judgment.

[11] The appellant also took issue with the respondent's entitlement, without having obtained leave, to pursue a cross-appeal in the matter. This was so despite rule 5(4) of this Court's Rules which states that "(a)ny respondent who wishes to cross-appeal must deliver a notice of cross-appeal" on the basis of s166(1) of the Labour Relations Act 66 of 1995 (the LRA) which provides that

—

'(a)ny party to any proceeding before the Labour Court may apply to the Labour Court for leave to appeal to the Labour Appeal Court against any final judgment or final order of the Labour Court'.

[12] It was submitted for the employee that the Labour Court's decision to award compensation to him in respect of procedural unfairness was reasonable and that on the facts the exercise of a discretion not to award compensation would have been unwarranted. As to interest, it was argued with reference to s143(2) of the LRA that interest may be ordered from the date on which the award was made. With reference to *Mkonto v Ford NO and Others*² and *Department of Correctional Services and Another v POPCRU and Others*,³ it was stated that leave to appeal was not required in order to cross-appeal to this Court. The material before the commissioner did not support the findings of misconduct made against the employee. Furthermore, given the finding of

² (2000) 21 ILJ 1312 (LAC) at para 8.

³ (2011) 32 ILJ 2629 (LAC) at para 21. See too *De Beer v Minister of Safety and Security and Another* (2013) 34 ILJ 3083 (LAC) at para 22.

procedural unfairness, the employee seeks that the Labour Court's limited compensation order be set aside and substituted with an order that four months' compensation be paid to him given that the Court is not limited to award compensation for the period outstanding on the fixed term contract.

Evaluation

[13] The Labour Court or an arbitrator appointed in terms of the LRA may, in terms of s193(1) of the LRA, where a dismissal is found to be unfair, order reinstatement, re-employment or the payment of compensation to the employee. Reinstatement "*must*" be awarded in terms of s193(2) where a dismissal is found unfair unless what have been termed the "*non-reinstatable conditions*" set out in s193(2) are present. Of these "*non-reinstatable*" conditions include in terms of s193(2)(d) that "*the dismissal is unfair only because the employer did not follow a fair procedure*".

[14] In the award of compensation for procedural unfairness in terms of s194(1):

'(1) The compensation...must be just and equitable in all the circumstances, but may not be more than the equivalent of 12 months' remuneration calculated at the employee's rate of remuneration on the date of dismissal.'

[15] The power to award a remedy under s193 is one to be exercised judicially,⁴ having regard to underlying considerations of fairness to both parties.⁵ This provision does not introduce an *onus* but requires the Court or arbitrator to take into account any relevant factors which apply to the determination.⁶ It follows that on review the Labour Court was required to consider whether the commissioner in the exercise of his discretion in terms of s 193(1)(c) to award compensation to the employee took into account such relevant factors and circumstances. Having found the dismissal of the employee procedurally

⁴ *Equity Aviation Services (Pty) Ltd v CCMA & Others* [2010] JOL 26192 (CC) at para 48.

⁵ *Billiton Aluminium SA t/a Hillside Aluminium v Khanyile* [2010] BLLR 465 (CC); *Equity Aviation* [2008] 12 BLLR 1129 (CC).

⁶ *DHL Supply Chain (Pty) Ltd v De Beer NO and Others*; [2014] 9 BLLR 860 (LAC); (2014) 35 ILJ 2379 (LAC) at para 21; *Equity Aviation Services Ltd v Commission for Conciliation Mediation and Arbitration and Others* [2008] 29 ILJ 2507; [2008] ZACC 16; [2008] 12 BLLR 1129 (CC) at paras 36 and 48.

unfair, the commissioner exercised a wide discretion under s193(1)(c) to award compensation to the employee. In its review of that decision, the Labour Court had regard to the nature of the procedural unfairness committed and the impact of that unfairness in the resultant prejudice caused to the employee. This was clearly the basis on which the Court *a quo* found that the commissioner's decision to award compensation could not be faulted. The fact that as much is not stated in express terms in the judgment *a quo* matters not when the Court detailed in critical terms the nature of the unfairness committed and its consequences for the employee.

[16] Turning to the quantum of the compensation ordered, the Labour Court properly had regard to the fact that while the employee had only sought that he be paid out until the end of his fixed term contract, the commissioner awarded compensation of four months. While it is so that compensation for procedural unfairness amounts to a *solatium* for the unfairness committed, the Court cannot be faulted for finding that it was neither just nor equitable to grant relief both beyond the period sought by the employee and in excess of the period which remained on his fixed term contract. Having found as much, neither the employee's entitlement to cross-appeal without leave nor the merits of such cross-appeal require consideration in this appeal.

[17] As to the interest ordered by the Labour Court, s143(2) provides that a money order contained in an arbitration award "*earns interest from the date of the award...unless the award provides otherwise.*" Section 2(1) of the Prescribed Rate of Interest Act 55 of 1975 states:

'(1) Every judgment debt which, but for the provisions of this subsection, would not bear any interest after the date of the judgment or order by virtue of which it is due, shall bear interest from the day on which such judgment debt is payable, unless that judgment or order provides otherwise.'

[18] S2A(5) provides that:

'(5) Notwithstanding the provisions of this Act but subject to any other law or an agreement between the parties, a court of law, or an arbitrator or an arbitration tribunal may make such order as appears just in respect of the

payment of interest on an unliquidated debt, the rate at which interest shall accrue and the date from which interest shall run.'

- [19] While there was no bar on the Labour Court ordering interest to be paid from the date on which judgment was reserved, I see no reason in this appeal as to why the terms of s143(2) should not be applied and interest ordered to be paid from date of the arbitration award in this matter. In conclusion, it must be noted that the conduct of the appellant's attorney, Dr Ebersohn, at the disciplinary hearings held, which was correctly criticised by the Labour Court in its judgment, was unacceptable and unprofessional.
- [20] There is no reason in law or fairness as to why the appellant should not be ordered to pay the costs of this appeal.

Order

[21] In the result, the following order is made:

1. The appeal is dismissed with costs, subject to the substitution of the order of the Labour Court as follows:

- '1. The dismissal of the First Respondent was procedurally unfair;
2. The Applicant is ordered to pay the First Respondent an amount equal to two and a half months' compensation, calculated at the rate of R54 166.67 per month, within ten (10) days of this order with interest calculated on such amount at the prescribed rate from the date of the arbitration award to date of final payment;
3. No order as to costs is made.'

Savage AJA

Waglay JP and Sutherland JA concur in the judgment of Savage AJA.

APPEARANCES:

FOR THE APPELLANT: Dr G Ebersohn

Instructed by Tracy Sischy Attorneys

FOR THE RESPONDENT: Mr R Grundlingh

Instructed by Tracy Sichy Attorneys

LABOUR APPEAL COURT